INDEX

	Page
Reply brief for petitioners	1
I. Mandamus is the proper remedy	1
II. The relators have the right to build a wharf from their land into the Potomac River	5
Conclusion	11

CITATIONS

CASES:

Baltimore & Ohio R. R. Co. v. Chase, 43 Md. 23, 34	6, 9
Bradshaw v. Ashley, 14 App. D. C. 485, 504	4
Chesapeake B. R. Co. v. Washington Co., 23 App. D. C. 587, 594	4
Evans v. United States, 31 App. D. C. 544, 550	7, 8
Georgetown v. Alexandria Canal Co., 12 Peters 91, 96	7, 8
***Herald v. United States*, 52 App. D. C. 147**	7, 8
Hoover v. Intercity Radio Co., 52 App. D. C. 339, 285 F. 1003, 266 U. S. 636	2
Lane v. Hoglund, 244 U. S. 174, 182	3
Marbury v. Madison, 1 Cranch 137	2
Marine Railway Co. v. United States, 257 U. S. 47	9, 10, 11
Morris v. United States, 174 U. S. 196	8
Page v. Mayor, 34 Md. 558	9
Potomac Steamboat Co. v. Upper Potomac Steamboat Co., 109 U. S. 672, 675	7, 8
Roberts v. United States, 176 U. S. 221, 231	3
Sanitary District v. United States, 266 U. S. 405	4
Shively v. Bowlby, 152 U. S. 1	10
Smoot Sand & Gravel Corporation v. Washington Airport, Inc., 283 U. S. 348, 351	7, 9
Wilson v. Inloes, 11 Gill & J. 351, 359	9
Work v. McAlester-Edwards Co., 262 U. S. 200, 208	3

STATUTES:

	Page
Compact of 1785, and Maryland Act of Ratification, Maryland Laws, Kilty, Vol. 2, Nov. 1785, Chap. 1	7
Maryland Act of Cession, Maryland Laws, Kilty, Vol. 2, November, 1791, Chap. 45, Sec. 2.....	10
Section 10 of Rivers and Harbors Appropriations Act of March 3, 1899, 30 Stat. 1151; also contained in 33 U. S. C., Sec. 403	1
Section 1278 of the District of Columbia Code (1924 ed.) 31 Stat. 1189, 1390; also found in Title 24, sec. 216 of 1929 District of Columbia Code.....	5

OTHER REFERENCES:

History of Maryland, Allan, p. 23	6
History of Maryland, Andrews, p. 60	6
Ruling Case Law, Vol. 9, page 843, par. 15, and page 915, par. 84	4
The Planters of Colonial Virginia, Wettenbaker, p. 29	6
The Virginians, Thackeray, chap. 3, third paragraph	7

Supreme Court of the United States

No. 677, October Term, 1932.

The United States of America, on Relation of Lucien H. Greathouse and Rebekah S. Greathouse, *Petitioners*,

v.

George H. Dern, as Secretary of War, and Lytle Brown, as Chief of Engineers.

Certiorari to the Court of Appeals of the District of Columbia.

REPLY BRIEF FOR PETITIONERS.

We shall adopt the order of argument followed in the brief for the respondents, so that the points of agreement and divergence may be clear:

I. Mandamus is the proper remedy.

(A) Respondents' counsel contend that Section 10 of the Rivers and Harbors Appropriation Act of 1899 authorizes, but does not require, action by the Secretary of War, in that the section prohibits the building of structures in navigable waters without his authority, but contains no direction to him to issue a license if there is no obstruction. It

is our contention that no *express* direction to the Secretary is necessary. The statute designates the Secretary of War as the official to whom application for permits shall be made, and the statute states the circumstances under which the Secretary is *not* to issue the permit. If the Secretary finds that these circumstances do not exist there remains the simple, plain and mandatory duty of the Secretary to issue the permit to a person who is entitled to have one, and who cannot build a wharf without such a permit.

For mandamus it is not necessary that the statute shall *expressly* direct that a thing be done. Thus in the leading case on mandamus, *Marbury v. Madison*, 1 Cranch 137, the action was brought to compel the Secretary of State to deliver to the plaintiffs their commissions as justices of the peace. The plaintiffs had been appointed and confirmed and their commissions signed by the President and sealed with the seal of the United States. The statute required the Secretary of State to affix the seal to commissions. It did not *expressly* command the Secretary to deliver the commissions, but the Court held (pp. 162, 172):

> "To withhold his commission * * * is an act deemed by the court not warranted by law * * *.
>
> "It is true, that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute. It is to deliver a commission; on which subject, the acts of congress are silent. This difference is not considered as affecting the case."

In the more recent case of *Hoover v. Intercity Radio Co.*, 52 App. D. C. 339, 286 F. 1003 (dismissed per stipulation 266 U. S. 636), a statute required radio stations to be licensed by the Secretary of Commerce. Although there was no express provision that the Secretary *should* issue a license, the court held that his duty to do so was mandatory.

A statute providing that a wharf could not be built in navigable waters without a permit but including no means

of securing a permit if the wharf did not obstruct navigation would be beyond the constitutional power of Congress, whose only control over rivers is in regard to navigation (see petitioner's brief page 11).

It has been repeatedly held by this Court that the fact that a statute must be interpreted is not a test of whether a duty is a ministerial one.

> "If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief." *Roberts v. United States*, 176 U. S. 221, 231.

In that case the statute was in fact rather obscure, but *as construed by the Court* it involved a ministerial duty in which the Secretary had no discretion. The writ of mandamus therefore issued. The quotation was repeated in *Lane v. Hoglund*, 244 U. S. 174, 182, and again in *Work v. McAlester-Edwards Co.*, 262 U. S. 200, 208.

As stated in the petitioners' brief, the discretion conferred upon the Secretary of War by the statute was to ascertain whether the granting of the permit would obstruct navigation. He exercised this discretion and found that navigation would not be obstructed. There remained then only the ministerial duty to grant the permit. To compel the performance of this duty, the writ of mandamus will issue.

The case is wholly different from *Sanitary District v. United States*, 266 U. S. 405, where the Secretary of War found that a further diversion of water from Lake Michigan *would* obstruct navigation. That finding, of course, was within his discretion and would not be reviewed. All of the cases cited by the respondents on this point involve discretion or quasi judicial functions.

(B) There is no question as to the relators' title. This suit is not brought to determine title, and it cannot possibly determine title. Certainly neither the Chief of Engineers nor the Secretary of War claims title to any of the property involved in the case, and no judgment in this case can possibly preclude anyone other than the parties to the suit. The question of title is only important in view of the fact that it has been suggested that the relators are not owners of land adjoining the Potomac River, and thus have no standing in Court.

But to *assert* that there is a dispute as to the relators' title is to assert a mere conclusion. There is *in fact* no dispute about it as far as this case is concerned. The relators have proved that they and their predecessors in title held possession under deeds conveying property bounded on the north by the river (R. 39, 40, 44, 48), and this would be a sufficient showing of title to establish a prima facie case even in an action of ejectment,

> "* * * a title prima facie is shown by a grant from some one who held possession, or by such grant and possession under it by the grantee. * * * If the objector has a better or stronger title than the prima facie title proved, then he must show it, and until he does the prima facie title prevails. * * *"
> 9 R. C. L. 843, Ejectment, Par. 15.

See also 9 R. C. L. 915, *Bradshaw v. Ashley*, 14 App. D. C. 485, 504; *Chesapeake B. R. Co. v. Washington Co.*, 23 App. D. C. 587, 594.

If the contention of the respondents were well founded *every* application for mandamus could be defeated by the mere assertion that the relators' interest is contested.*

II. The Relators have the right to build a wharf from their land into the Potomac River.

(a) We admit that the United States has title to the land below the high-water mark. We contend, however, that during the Colonial period in Maryland and Virginia a common law right to build wharves in the Potomac and the other great tidal rivers became established. It is reasonable to believe that such a right was established before 1688, the date of the grant to Lord Culpeper. Certainly it was eventually established. (See relators' brief, pp. 16 to 20.)

(b) The relators agree that they acquired no right by prescription based on the use of a particular wharf. As stated in the plaintiffs' brief, we contend that by usage from earliest times in Maryland and Virginia the riparian owner has been conceded the right to maintain a wharf into navigable water, and that the highest courts of both states have declared that the riparian owner has such a right at *common law*, and that the right is *property*. (See relators' brief, pp. 18, 19). We agree that the law of Maryland is controlling rather than the law of Virginia. The law of Virginia is interesting, however, in that it agrees with that of Maryland, and illustrates the method of early plantation commerce that existed in those colonies on the Potomac and the other great tidal rivers and bays. We have cited decisions of the highest courts of Maryland and Virginia to the effect that the right to wharf out to navigable water existed at common law and was property. (See

*Section 1278 of the Code of the District of Columbia expressly provides for the trial of issues of fact in actions of mandamus, 31 Stat. 1189, 1390.

relators' brief, p. 19.) We agree that the statement to that effect in *Baltimore & Ohio Railroad Co. v. Chase,* 43 Md. 23, 34, is dicta, but we assert that the dicta of the highest court of the state should be considered a correct statement of the law of that state, especially in the absence of any decision to the contrary.

Counsel for the respondents argue that the fact that statutes were enacted in Maryland in regard to wharves in particular localities indicates that there was no right to build a wharf at common law. We do not regard this argument as well founded. It is more reasonable to suppose that there was a right to build a wharf at common law as asserted by the highest court of Maryland, and that the plantation owner undoubtedly had such a right, but that when a city or town was established a special statute would be enacted to encourage and control the building of wharves in that particular locality.

Counsel for the respondents further argue that the fact that the Compact of 1785 provided that the citizens of each state should have full property in the shores of the Potomac adjoining their lands and the privilege of making and carrying out wharves is evidence that no general right of wharfage existed prior to the Compact. We do not think that this argument is well founded. We believe that it is more reasonable to consider that the Compact of 1785 in that respect recognized and affirmed existing rights rather than created new rights.

The respondents' brief does not agree with our statement that the wharf was a necessity of plantation life in Maryland and Virginia, and that by usage in these Colonies the owners of the great plantations bordering tidal streams did in fact build and maintain their wharves. As authority for this in addition to the quotations in respondents' brief at page 17, see *History of Maryland,* Allan, p. 23; *History of Maryland,* Andrews, p. 60; *The Planters of Colonial Virginia,* Wettenbaker, p. 29. We venture to say

that statements to the same effect can be found in *any* book dealing with life in Colonial Maryland or Virginia, as for example in Thackeray's famous novel *The Virginians,* chapter 3, third paragraph.

(C) The respondents contend that the Compact of 1785 between Maryland and Virginia is not in force in the District of Columbia and that the relators have no rights arising therefrom. It is true that some of the decisions contain general statements to the effect that the citizens of Virginia and Maryland were not parties to the Compact, that after the cession to the District of Columbia the Compact was under the control of Congress, *Georgetown v. Alexandria Canal Co.*, 12 Peters 91, 96; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S., 672, 675, and even that the Compact was never in effect in the District of Columbia, *Evans v. United States*, 31 App. D. C. 544, 550, *Herald v. United States*, 52 App. D. C. 147. In *Smoot Sand & Gravel Corporation v. Washington Airport, Inc.*, 283 U. S. 348, 351, however, this Court speaks of the Compact as giving a right to build wharves.

These decisions should be considered with regard to the facts in each case. The Compact of 1785 had several aspects. Primarily it had to do with commerce and navigation, but it also affirmed the right of the Virginia landowner to build a wharf to navigable water. This right which existed at common law in Virginia and Maryland as a property right (see p. 19 relators' brief) was reaffirmed as a property right in the Compact in this language:

> "Seventh, The citizens of each state respectively shall have full property in the shores of Patowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharfs and other improvements, so as not to obstruct or injure the navigation of the river * * *." *Maryland Laws*, Kilty, Vol. 2, Nov. 1785, Chap. 1.

None of the decisions arising in the District of Columbia courts have dealt with the right to build a wharf into the Potomac River from the Virginia shore. We shall review them briefly:

In *Georgetown v. Alexandria Canal Co.*, 12 Peters 91, the mayor and council of Georgetown brought suit to restrain the building of an aqueduct across the Potomac on the ground that it injured navigation in violation of the Compact of 1785. The Court held primarily that the plaintiffs did not have a sufficient interest to bring the suit. It was further stated that after the cession by Maryland and Virginia to the District of Columbia Congress had full power to create bridges or aqueducts within the District.

In *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, the plaintiffs were in possession of a tract of land bordering on Water Street which was on the margin of the river, and claimed that the riparian rights on the side of the street opposite their tract attached to it. The case turned on the history of the real estate titles. The decision was that the plaintiffs were not riparian owners, because the street intervened between their property and the river.

Morris v. United States, 174 U. S. 196, held that the title to the Potomac flats adjacent to the District of Columbia was in the United States as successor to Maryland. It was held that the grant to Lord Baltimore of the navigable water and the soil under it was

> "as a public trust for the benefit of the whole community, to be freely used by all for navigation and fishery, and not as private property, to be parcelled out and sold for his own individual emolument".

For this reason the soil under the river passed not to the heirs of Lord Baltimore, but to Maryland and later to the United States, which now holds for the same purposes.

Evans v. United States, 31 App. D. C. 544, and *Herald v. United States*, 52 App. D. C. 147, were both criminal

cases, involving the convictions of men who stood on the Virginia shore and fished below high-water mark in violation of the District of Columbia police regulations. It was held that the boundary ran to high-water mark, and that any right that a citizen of Virginia had to fish in the District of Columbia was subject to the police regulations of the District.

Marine Railway Co. v. United States, 257 U. S. 47, was an action of ejectment to recover filled land in the Potomac River adjacent to Virginia property.

> "Except as to an insignificant portion * * * which it is agreed may be disregarded, this strip lay below low water mark".

It was held that the United States had title, that it could fill the land under the river and that such filled land belonged to the United States.

Smoot Sand & Gravel Corporation v. Washington Airport, Inc., 283 U. S. 348, was a suit to enjoin a contractor operating under Government contract from excavating and filling lands on the south shore of the Potomac. The Court decided that the boundary line was at high-water mark and this was the sole question involved in the case.

Certainly none of these cases have decided adversely our contention that the Compact of 1785 reaffirmed the common law right of the Virginia landowner to build a wharf into the Potomac. If he did not have such a right at common law, the Compact of 1785 and its adoption by the Maryland Act 1786 gave him the right to wharf into the Potomac. This right is declared to be "property" in the Compact. In Maryland the right to wharf is considered a property right, *Baltimore & Ohio R. R. Co. v. Chase*, 43 Md. 23, 34; *Page v. Mayor*, 34 Md. 558; *Wilson v. Iuloes*, 11 Gill & J. 351, 359. The relators as owners of the riparian land still have this property right, as the act of cession to the District of Columbia expressly provided:

> "* * * nothing herein contained shall be so construed to vest in the United States any right of property in the soil, as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States, * * *" *Maryland Laws*, Kilty, Vol. 2, November, 1791, Chap. 45, Sec. 2.

(D) The decisions in *Shively v. Bowlby*, 152 U. S. 1, and *Marine Railway Co. v. United States*, 257 U. S. 47, relied on by the respondents have no important bearing on the questions in this case.

The decision in *Shively v. Bowlby, supra*, turned upon the construction of a statute of Oregon. This statute did not purport to give or recognize any *property rights* as did the Compact of 1785, nor had there been established in Oregon any common law right to build and maintain wharves, by usage of hundreds of years recognized by the highest courts of the state, as in Maryland and Virginia. The situation was totally different in the Columbia River from that in the Potomac. Thus in the very case of *Shively v. Bowlby, supra*, this Court pointed out, p. 26:

> "The foregoing summary of the laws of the original States shows that *there is no universal and uniform law upon the subject;* but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. *Great caution, therefore, is necessary in applying precedents in one State to cases arising in another.*" (Italics ours.)

In *Marine Railway Co. v. United States*, 257 U. S. 47, this Court said (p. 65):

> "The only question before us is of the rights of the United States to fill land that hitherto has been under water."

Counsel for the respondents argue that if the United States can fill the land under the Potomac "it must follow that the relators had no right to build a wharf on the land against the objection of the United States". This appears to us to be a *non sequitur*. The United States may have the right to fill in the land now covered by the Potomac River in front of relators' property, *but until the United States does so the relators have the right to build a wharf into the river from their land.* Should the United States ultimately fill the land now under the river, other questions will arise which are not involved in this case. Such a possibility was contemplated by this Court in *Marine Railway Co. v. United States, supra,* when the Court said at the conclusion of the opinion in that case:

> "It may happen that such filling as is done in this case will interrupt previously existing access to the water front. But that does not affect the right of the United States to possession of the land. What other rights, if any, the plaintiff in error may have does not concern us now."

Conclusion.

It is therefore urged that the decision of the Court of Appeals of the District of Columbia be reversed with direction that the writ of mandamus issue as prayed.

Respectfully submitted,

J. Harry Covington,
John Marshall,
Spencer Gordon,
Attorneys for Petitioners.